2010

# Timpanogos Hospital and Zurich American Insurance v. Tara Bishop and Utah Labor Commission : Brief of Appellee

Utah Court of Appeals


K. Dawn Atkin; Atkin & Associates; Alan Hennebold; attorney for petitioner.
Eric Pollart; Thomas, Pollart & Miller; attorneys for respondent.

IN THE UTAH COURT OF APPEALS

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| TIMPANOGOS HOSPITAL and ZURICH AMERICAN INSURANCE, | : | Case No. 20100110 |
| Appellants/Petitioners, | : | |
| vs. | : | |
| | : | Labor Commission No. 06-0240 |
| TARA BISHOP and UTAH LAB0OR COMMISSION, | : | |
| | | Priority 7 |
| Appellees/Respondents | : | |

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**BRIEF OF APPELLEE**
**TARA BISHOP (EMPL0YEE)**

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Appeal from the Labor Commission of Utah
Administrative Judge Richard M. La Jeunesse

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## JURISDICTION

The Petition for Review by Employer is from an Order Affirming ALJ's Decision issued by the Appeals Board of the Utah Labor Commission of Utah, dated January 22, 2010, with regard to the Amended Findings of Fact, Conclusions of Law and Order issued by Richard M. La Jeunesse, Administrative Law Judge, dated January 3, 2007. This Court has jurisdiction over appeals from workers' compensation decisions of the Labor Commission pursuant to Utah Code Anno. §34A-2-801 (8), §63G-4-403, and §78A-4-103 (2008).

## DETERMINATIVE STATUTES AND RULES

This matter is governed by the provisions of Utah's Workers' Compensation Act and the Utah Administrative Procedures Act (UAPA). Under §34A-2-802 of the Worker's Compensation Act, the Commission is given the authority to make its investigations into workers compensation claims, "in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties." Further, the act authorizes the Commission

to "receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant including, but not limited to . . .reports of attending or examining physicians..."

*Utah Code Anno.* §34A-2-601 (2002) establishes that, "(1)(a) The Division of Adjudication may refer the medical aspects of a case described in Subsection (1) (a) to a medical panel appointed by an administrative judge..." Administrative Rule 602-2-2 sets forth "guidelines" for when such a medical panel is to be utilized:

> A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports."

Administrative Rule 602-2-1 (H) sets forth the rules concerning the required exchange of medical records by the parties for purposes of creating the Medical Exhibit to be filed. It provides, in pertinent part:

> "1. The parties are expected to exchange medical records during the discovery period.
>
> 2. Petitioner shall submit all relevant medical records contained in his/her possession to the respondent for the preparation of a joint medical records exhibit at least twenty (20) working days prior to the scheduled hearing.
>
> 3. The respondent shall prepare a joint medical record exhibit containing all relevant medical records
>
> * * *
>
> 5. The medical record exhibit prepared by the respondent shall be delivered to the Division and the petitioner or petitioner's counsel at least ten (10) working days prior to the hearing. Late-filed medical records may or may not be admitted at the discretion of the administrative law judge by stipulation or for good cause shown . . ."

Administrative Rule 602-2-1(I) (3) sets forth the rules with regard to disclosure of general evidence items. It provides, in pertinent part:

> No later than 45 days prior to the scheduled hearing, all parties shall file a signed pretrial disclosure form that identifies: *** (4) exhibits, including reports, the parties intend to offer in evidence at the hearing *** The administrative law judge may exclude witnesses, exhibits, evidence, claims, or defenses as appropriate of any party who fails to timely file a signed pre-trial disclosure form as set forth above * * * The pre-trial disclosure form does not replace other discovery allowed under these rules."

Administrative Rule 602-2-1 (I) (8) sets forth the rules with regard to closing the record at the end of the hearing. It provides:

> "Subject to the continuing jurisdiction of the Labor Commission, the evidentiary record shall be deemed closed at the conclusion of the hearing, and no additional evidence will be accepted without leave of the administrative law judge."

## STATEMENT OF THE CASE

### NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS

This case concerns a dispute over whether the Labor Commission, following a similar determination by the Administrative Law Judge, under the specific facts of this case, must be found to have abused its discretion, that is to have overstepped "the bounds of reasonableness and rationality" in its award of benefits to Employee. Specifically, Employer contends that there were numerous "errors" involved during the process which resulted in that award, including: (1) failing to refer the issues of medical causation and reasonable and necessary medical care to a medical panel; (2) refusing to "remand, reopen or consider new evidence" from a deposition of Dr. Abolnik taken in May of 2008 in another case; (3) the lack of any substantial evidence to support its decision; (4) allowing Employee to introduce Ms. Mecham's medical records while refusing to allow Employer to introduce Dr. Moress' medical records review.

Employee filed an Application for Hearing with the Commission on March 9, 2006, claiming entitlement to workers' compensation benefits arising out of an industrial event where she contracted meningitis when a patient for whom she was providing care (Ms. Mecham) vomited on her on August 19, 2002. In that Application, Employee sought medical expenses, medical care, and permanent partial and permanent total disability compensation. She amended her Application on May 23, 2006 to include occupational disability benefits. On July 25, 2006, Employee filed a second Amended Application for Hearing to include claims for temporary total disability compensation and mileage.

On Monday, September 5, 2006, at 8:30 a.m, a hearing was held. In light of the consensus that Employee was not yet medically stable, the permanent partial disability and permanent total disability claims were dismissed as unripe, without prejudice, and the hearing proceeded on the Temporary Total Disability Claim.[1]

On December 11, 2006, the ALJ issued his Findings of Fact, Conclusions of Law and Order finding in favor of Employee and awarding her temporary total disability benefits commencing on June 1, 2006. On January 3, 2007, the ALJ issued Amended Findings of Fact, Conclusions of Law and Order to correct the start date for the temporary total disability benefits to June 1, 2005.

On February 2, 2007, Employer filed its Motion for Review and Employee's response followed. On August 5, 2008, after the Motion for Review had been pending for a year and a half, Employer filed a Motion to Remand, Reopen, or Consider New Evidence on Review,

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[1]R. 375 at 24 - 25

in which Employer sought to introduce a deposition of Dr. Abolnik taken several months earlier on May 27, 2008 in a malpractice proceeding in Third District Court, in which, Employer contended, Dr. Abolnik had testified that Rocky Mountain spotted fever could explain all of the Employee's symptoms and Employee's response timely followed.

On January 22, 2010, the Appeals Board of the Utah Labor Commission filed its Order Affirming ALJ's Decision, in which it affirmed the ALJ's decision in favor of Employee and declined to reopen the case based upon the Abolnik deposition.

On February 9, 2010, Employer filed its Petition for Review to the Utah Court of Appeals and this Appeal proceeded .

## STATEMENT OF FACTS

As is generally the case in workers compensation matters, the underlying facts are vital to a determination of whether the Commission abused its discretion with regard to its determinations. In this case, the relevant underlying facts include the following:

1. The Order of the Appeals Board set forth the following summarized version of the basic facts underlying this case as had been set forth in greater detail by the ALJ in his Amended Findings of Fact, Conclusions of Law and Order:[2]

> On August 19, 2002, while working as a nurse at Timpanogos, Ms. Bishop was assigned to care for Ms. Mecham, a hospital patient. Ms. Mecham developed a headache, shaking, fever and nausea, and accidentally vomited on Ms. Bishop's exposed arm. A few days later, Timpanogos informed Ms. Bishop that Ms. Mecham had meningitis and that Ms. Bishop should notify her supervisor if she experienced any symptoms.

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[2]R. 198

> On August 24, 2002, Ms. Bishop developed a headache and other symptoms. On August 25, 2002, her supervisor instructed her to report to the Timpanogos emergency room because her symptoms matched those of Ms. Mecham. At the emergency room Ms. Bishop underwent a spinal tap and other tests for meningitis. Over the next several days, Ms. Bishop's symptoms worsened and she returned to Timpanogos' s emergency room on August 29, 2002. She was admitted into the hospital's intensive care unit and underwent another spinal tap. She then received morphine, became over-sedated and stopped breathing for a time.
>
> Ms. Bishop was subsequently released from the hospital. The results of her tests for meningitis were somewhat ambiguous, resulting in equivocal diagnoses by some medical experts. However, other medical experts were unequivocal in their opinion that Ms. Bishop did, in fact, suffer from some variation of meningitis. After her ordeal, Ms. Bishop was left with chronic backache from the spinal taps she had received in the hospital. She also suffered a hypoxic brain injury, post-traumatic stress disorder, depression and tinnitis. In summary, the opinions of Ms. Bishops treating physicians and Timpanogos's own medical experts establish that Ms. Bishop's initial illness and subsequent complications were caused by her work exposure and subsequent efforts to diagnose and treat her work-related illness.[3]

2. In his Amended Findings of Fact and Conclusions of Law, in addition to the setting forth the underlying facts regarding the manner in which Employee's injuries occurred, the ALJ set forth an extensive, detailed, chronological outline of statements from the various medical providers throughout Employee's course of treatment, through the time of the hearing, with regard to the relationship between the exposure of August 19, 2002 and Employee's ongoing difficulties, including the following:

a. In her emergency room report of August 25, 2002, Dr. Rowley felt that the white blood cell count in Employee's spinal fluid did not indicate meningitis but still noted in her

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[3]R. 367, 368

diagnosis the need to rule out meningitis.[4]

b. Dr. Abolnik on August 30, 2002 initially evaluated Employee, noting, "No clear evidence of meningitis. I see meningismus most only in muscle pain on the back. A viral infection possibly transmitted through the vomitus of the patient is a possibility."[5]

c. Dr. Berry on September 9, 2002 diagnosed Ms. Bishop with "backache" caused by a "reaction to spinal or lumbar puncture."[6]

d. Ms. Bishop had an MRI scan of her lumbar spine on December 31, 2002 that came back "normal."[7]

e. On December 31, 2002, Dr. Berry diagnosed Ms. Bishop with a 'hypoxic brain injury" and post traumatic stress disorder.[8]

f. Dr. Stuart King on February11, 2003 assessed Ms. Bishop with, "Probable viral meningoencephalitis and post viral neurpathy pain. Severe spinal pain and probable arachnoiditis. Neurobehavioral and mood disorder with cognitive deficits due to hypoxic brain injury."[9]

g. On February 5, 2003, Ms. Bishop was seen by Dr. Christopher Reynolds as a neurological consult. Dr. Reynold's impressions included:

[4]R. 373 at 188 - 189

[5]*Id.* at 207

[6]*Id.* at 134

[7]*Id.* at 290

[8]*Id.* at 295

[9]*Id.* at 314

> "Residual affective/cognitive problems - the patient's hospitalization for meningitis was complicated by respiratory arrest. This may have produced some potential for hypoxic injury, although her gross cognitive performance appears within normal. Certainly the psychological trauma or hypoxic injury itself might reasonably explain some of her affective problems she is experiencing currently. There could well be some complex overlap with her chronic pain, affective problems, cognitive problems, sleep problems, and some of the medicines she is using to manage these.[10]

h. On February 18, 2003 Dr. Erin Bigler, Ph D., evaluated Ms. Bishop and concluded that her neuropsychological studies did reflect significant problems with "attention/concentration" and that, "attentional deficits can be a sequella of meningitis, hypoxic injury, development of chronic pain, and/or emotional sequella related to any of the above."[11]

i. On March 6, 2003, Dr. Stuart King reflected his clinical impression of "anoxia as well as direct infection or meningoencephalitis as a cause of brain disfunction and resulting pain" and "[I] also note the high level of monocyte she had in her cerebral spinal fluid and that she does have shrinking of the ventricles in the brain as documented on the MRI indicative of global swelling. I thus disagree with the radiologist who said her brain scan was normal."[12]

j. On March 19, 2003, Dr. Valton King, D.O., concluded Ms. Bishop had, "Traumatic brain injury secondary to anoxia . . . Possible arachnoiditis as the cause of focal pain in her

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[10] *Id.* at 312

[11] *Id.* at 117

[12] R. 374 at 638

lumbar spine."[13]

k. Dr. Jeff Chung performed an IME for Employer on March 25, 2003 reflecting:

> She most likely has fully recovered from her episode of possible viral meningitis." * * * The patient most likely does have a physiologic problem with a mild hypoxic brain injury, but it is unlikely that the patient's mild hypoxic brain injury without observable evidence of pathology on a MRI scan of the brain will cause significant longstanding cognitive deficits * * * My concern is with Ms. Bishop's current problems with anxiety/depression, chronic pain syndrome and postraumatic stress disorder which most likely have been caused by the sequence of events that began after her industrial exposure of 8-19-02.[14]
>
> * * *
>
> Given the circumstances surrounding Ms. Bishop's clinical onset of symptoms starting on 8-19-02 and the complications that she has had subsequent to the medical treatment for such exposure, I believe the entirety of her current problems should be considered industrial without a preexisting nonindustrial component.[15]

l. Dr. Douglas Ross, a pulmonologist, had a consult with Ms. Bishop on September 2, 2003 and concurred in her diagnosis of anoxic brain injury, sleep disorder, postraumatic stress disorder and depression[16] On October 15, 2003, Dr. Ross further explained that Ms. Bishop, "had an episode of what appears to be encephalitis associated with a respiratory arrest and has posttraumatic stress disorder and difficulty sleeping since then."[17]

m. On September 8, 2003, Dr. Valton King, D.O., in a letter to Dr. Berry reflected:

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[13] *Id.* at 643

[14] R. 373 at 24

[15] *Id.* at 26

[16] R. 374 at 404

[17] *Id.* at 405A

> As you know, her ongoing recovery from her anoxic brain injury and meningoencephalitis has been very complicated. She has ongoing severe spinal pain and weakness in deconditioning physically. She also has a significant sleep disturbance for which Dr. Ross of pulmonology is now evaluating her. She has ongoing problems with depression and anxiety for which she is seeing a psychologist, Dr. Seamons. She has ongoing cognitive and perceptual deficits but will be seeing Dr. Bigler of neuropsychology and at this month. Her rehabilitation has been very complicated, involving multiple specialists . . . I note there are still ongoing medical legal concerns as to whether all of these problems are ultimately work related. In my opinion they are."[18] (Emphasis added).

n. Dr. David Seamons, Ph D., on March 31, 2004 also diagnosed Ms. Bishop with "posttraumatic stress disorder."[19]

o. Dr. John Knippa, Ph D., conducted a psychological IME on behalf of Employer. In his report dated May 24, 2004, he set forth his diagnosis as follows:

> AXIS 1: Anxiety disorder . . . PRIMARY DIAGNOSIS. Mixed symptom patterns corresponding to criteria for PTSD, Genereralized Anxiety Disorder, and Specific Phobia . . . Major Depressive Disorder ... Insomnia related to Anxiety Disorder, pain Disorder, Depressive Disorder ... Pain Disorder Associated with both Psychological Factors and a General Medical Condition.[20]

Dr. Knippa then indicated, "In summary, my impression is that Ms. Bishop developed and (sic) Acute Stress Disorder that arose directly from the events of 8/19/02. Unfortunately, that evolved into a Posttraumatic Stress Disorder."[21]

p. On August 16, 2004, Dr. Robert Arborn filed a Physician's Initial Report of Work

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[18] *Id.* at 722

[19] R. 373 at 90

[20] *Id.* at 64

[21] *Id.* at 67

Related Injury and diagnosed Ms. Bishop with tinnitis secondary to the meningitis and hypoxic episode (sic) arising out of the events of August 19, 2002.[22]

q. On November 5, 2004, Dr. Seamons indicated, "Tara has been diagnosed with Posttraumatic Stress Disorder as a result of her physical and psychological reaction to her respiratory arrest which occurred on August 29, 2002."[23]

r. On March 7, 2005, Dr. Stuart King set forth a detailed medical records review in which he indicated that his review of the lumbar spine x-ray and MRI scan of December 31, 2002 were "normal," that the August 31, 2002 MRI scan of the brain was "normal," that the January 9, 2003 MRI scan of the brain was a "negative exam", that the x-rays of the lumbar and thoracic spine dated November 8, 2004 were "negative," and that the cervical spine x-ray of November 8, 2004, reflected "mild C5-6 disc narrowing, with straightening of the cervical spine secondary to muscle spasm." He also noted in his medical records review the "negative cerebral spinal fluid and blood cultures" in Dr. Abolnik's records and that the complete blood count and comprehensive metabolic panel were "unremarkable." Despite those negative tests, he clearly enunciated his extensive and detailed diagnosis based upon all of the records as follows:

> 1. Acute viral meningitis with acute cervical, thoracic, and lumbar spinal pain secondary to meningismus and muscle spasm.
> 2. Acute respiratory arrest secondary to adverse drug reaction with hypoxic brain injury.
> 3. Residual chronic cervical, thoracic, and lumbar spinal pain
> 4. Residual chronic cognitive, attention, concentration, and neurobehavioral-

[22] *Id.* at 380

[23] *Id.* at 98

mood deficits
5. Residual chronic tinnitis and motion intermittent dizziness
6. Residual post-traumatic stress disorder
7. Acute cervical, thoracic, and lumbar spinal strain sprain, secondary to injuries sustained in a motor vehicle accident November 8, 2004, with exacerbation of pre-existing spinal pain, now resolved without significant residual[24]

s. On August 2, 2006, Dr. Berry provided the following lengthy analysis supporting his diagnosis that Ms. Bishop actually contracted meningitis from her exposure on August 19, 2002:

> I am Tara Bishop's primary care physician. After reviewing the charting, laboratory results and based on my observations of Tara Bishop during the period of August 25, 2002 - September 1, 2002, it is my professional medical opinion that Tara Bishop was correctly diagnosed with Meningitis. Based upon the laboratory results and clinical manifestations, I conclude that a diagnosis of Aseptic Meningitis is the most appropriate form of Meningitis that this patient manifested. The medical definition of Aseptic Meningitis is an inflammation believed to be limited to the meninges. As a result of the pathogen remaining confined in the meninges in approximately 25% of Aseptic Meningitis cases no specific pathogen can be isolated. Furthermore, Clinical manifestations of Aseptic Meningitis are mild compared to those associated with Bacterial meningitis. Manifesting itself with mild generalized throbbing headache, mild photophobia, mild neck pain, stiffness, and fever.[25]

Dr. Berry then went on to review Ms. Bishop's medical treatment history to support these conclusions.[26]

3. After the detailed analysis of the medical records, the ALJ found:

> The undisputed evidence in this case verified that on August 19, 2002 Gayelin Mecham while a patient at Timpanogas contracted meningitis and vomited on

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[24]R. 374 at 801

[25]R. 373 at 362

[26]*Id.* at 362 - 363

> her attending nurse Tara Bishop who then also contracted meningitis. The unrefuted evidence in this case also confirms that while in the course of being treated for her meningitis symptoms at Timpanogas, Ms. Bishop went into respiratory arrest after receiving morphine. The medical evidence in this case established without any serious challenge that the occurrence of August 19, 2002 and consequent events thereafter caused Ms. Bishop to suffer: (1) meningitis; (2) hypoxic brain injury; (3) posttraumatic stress disorder; (4) depression disorder; (5) anxiety disorder; (6) chronic back pain; and (7) tinnitis. Early reservations by ER physicians about definitively diagnosing Ms. Bishop with meningitis were just that, early reservations subject to further observation and data. All of the medical experts agreed in consensus that the events of August 19, 2002 and those subsequently related thereto cause Ms. Bishops current medical and psychological problems as they are associated disabilities.[27]

The ALJ included a footnote (9) to that finding which additionally reflected, "Some of the medical experts remained within their fields and limited their opinions accordingly. Other experts rendered opinions with varying degrees of conviction about certain diagnoses without challenging the existence of the condition head on."[28]

4. In his Amended Findings of Fact and Conclusions of Law, the ALJ found that Employee made an attempt to return to work part time in November of 2002 but that those efforts failed after two days and she did not return to work in any capacity after November of 2002. Employer terminated Employee on October 22, 2004.[29] The ALJ then went on to provide another extensive chronological summary of what each of the medical providers had reflected concerning Employee's disability for work:

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[27]R. 207

[28]*Id.*

[29]R. 154

a. On March 25, 2003, Dr. Chung concluded in his IME report to Employer, "Although I do not believe Ms. Bishop is at maximum medical improvement, I believe that it would be in Ms. Bishop's best interest to stop working as a labor and delivery nurse."[30]

b. On August 20, 2003, in an updated IME report to Employer, Dr. Chung reflected that Ms. Bishop was medically stable with respect to her lumbar spine complaints and gave her an impairment rating for them.[31] However, with respect to the posttraumatic stress disorder and cognitive problems, Dr. Chung noted an ongoing improvement in her function and endorsed ongoing treatment.[32]

c. On November 11, 2003, Dr. Stuart King released Ms. Bishop to sedentary work as to her physical and organic brain function. However, he deferred to her psychologist as to her ability to work given her emotional problems.[33]

d. Employee's psychologist, Dr. Seamons, indicated on March 31, 2004 that, with respect to her posttraumatic stress disorder, "Progress has been significant from the onset of treatment and continued progress is still anticipated and needed.[34]

e. Dr. Knippa's May 24, 2004 IME report indicated Employee's problems with anxiety had prevented her return to "her usual and customary work." He also stated:

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[30]R. 373 at 27

[31]*Id.* at 38

[32]*Id.* at 39

[33]R. 374 at 732

[34]R. 373 at 93

> As to duration of treatment, I believe that the extended time since injury and prominence of symptom complaints warrants that this be estimated as longer rather than shorter. An initial course of psychiatric care, assuming relatively prompt response would probably be not less than 9 months and as long as 2 years."
>
> * * *
>
> Ms. Bishop is considered from a mental and behavioral prospective to be Temporarily and Totally Disabled on the basis of mental and behavioral symptoms that appear to arise predominantly out of the mishap that occurred during the course of her treatment for industrial exposure.
>
> * * *
>
> I believe that she will probably not return in the reasonably foreseeable future to her usual and customary employment as a labor and delivery nurse in a hospital setting."[35]

f. On October 11, 2004, Dr. Stuart King declared:

> She still has a great deal of activity intolerance related not only to her spinal pain but to her cognitive perceptual deficits associated with her brain injury. She has difficulty concentrating or focusing for any extended length of time. She is unable to stand up or sit for more than 20 or 30 minutes before needing a break to rest because of the pai. For both these reasons, I believe she is essentially disabled from any sort of competitive or by the clock type work.[36]

g. On November 5, 2004, Dr. Seamons noted, "It is anticipated that additional progress will be made both physically and psychologically as therapy continues."[37] He then set forth a list of restrictions on her functional abilities, concluding, "The above listed restrictions are felt to be severe enough to cause serious question as to whether Tara will be capable of part or full time employment in the near future."[38]

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[35]*Id.* at 65 - 70

[36]R. 374 at 750

[37]R. 373 at 98 - 99

[38]*Id.* at 100

h. On March 7, 2005, Dr. Stuart King determined that Employee was still medically unstable as to her PTSD.[39] On August 24, 2005 he prescribed a power scooter for her use due to her lack of physical endurance or energy, explaining that, "Without the use of a powered scooter, she is essentially homebound."[40] On February 15, 2006 he enumerated a number of restrictions on Ms. Bishop's functional abilities including: (1) can walk without rest 2-3 city blocks; (2) continuously sit at one time 15 minutes; (3) continuously stand at one time 5 minutes; (4) can sit or stand/walk to in an 8 hour working day with normal breaks less than 2 hours; (5) must change positions frequently to minimize pain, must walk for 5 minutes every 5 minutes, and; (6) will required unscheduled breaks in an 8 hour work day. He also gave Ms. Bishop lifting restrictions of no more than 10 pounds.[41]

i. On March 3, 2006 Dr. Seamons urged: "It is critical to continue therapy in order to insure additional progress"[42] and on July 25, 2006, that Employee required at least 60 more outpatient visits before she could be declared at maximum psychological improvement.[43]

j. Employee underwent a Functional Capacity Evaluation by Mark Anderson, PT , on May 30, 2006. Mr. Anderson found that she could only perform at a sedentary level for at most three hours in an eight hour work day and concluded, "Based on the actual results of

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[39]R. 374 at 802

[40]*Id.* at 818

[41]The ALJ noted that these records of Dr. Stuart King were not in the medical record

[42]R. 373 at 111

[43]*Id.* at 112-113

this FCE and the job description provided by Ms. Bishop, she cannot return to her regular job/function at this time."[44]

k. On August 8, 2006, Del Felix, PT, performed an FCE for Employer in which he concluded:

> Even though she lifted and carried up to twelve pounds occasionally and five pounds frequently, she reported that she can not tolerate the way she feels following activities. * * * By lifting and carrying up to twelve pounds occasionally and five pounds frequently, Ms. Bishop met the LIGHT Physical Demand Characteristic of Work Category according to the U. S. Department of Labor."[45]

l. On August 31, 2006, Dr. Knippa concluded that Employee's psychological treatment had not been adequate to date and she requied combined psychiatric and psychological therapy coordinated with pain management.[46]

5. After the detailed analysis of the medical records concerning Employee's temporary total disability, the ALJ found:

> In conclusion, Ms. Bishop never returned to work after November 2002. The undisputed medical evidence in this case verified that as of the date of the hearing in this case Ms. Bishop had not achieved medical stability with respect to her industrially caused psychological problems. The parties in fact stipulated that Ms. Bishop had not achieved medical stability as of the date of the hearing in this matter. The undisputed medical evidence in this matter also confirmed that the functional restrictions medically resultant from her industrial caused physical and psychological problems prevented Ms. Bishop from returning to her regular employment as a labor and delivery nurse.[47]

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[44]*Id.* at 75

[45]*Id.* at 8

[46]The ALJ noted that these records of Dr. Felix were not in the Medical Record

[47]R. 210

6. The ALJ found that Employee was entitled to temporary total disability compensation from June 1, 2005 (the date at which Employee testified that payments had terminated[48]) up to the date of the Hearing on September 5, 2006 for a total of 65.86 weeks at $340.00 per week, for a total of $22,392.00. The ALJ further found that entitlement will continue until she reaches medical stability, or they have paid a total of 312 weeks of benefits, or she returns to full time employment.

7. At the hearing, Employee indicated that the patient she had been caring for and who had vomited on her on August 19, 2002 had been diagnosed with meningitis. She stated that when she returned to work the Wednesday following the incident, "The nurse that was there during the day said to me, 'Did you hear what happened?' And I said, 'What do you mean?' And she said, 'We just got–the lady that was in room 12,' which was where she was, 'we just admitted her today to ICU with meningitis."[49] She also testified that the next evening, when she returned to work, they had an email "that stated that they were assuming it was bacterial meningitis and that basically there was really nothing that we needed to worry about, that if we came down with any of the symptoms that we should contact our supervisor."[50] She further testified that she also talked with Ms. Mecham directly after the incident and confirmed that she had meningitis and identified the two pages of progress notes

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[48]R. 375 at 78 - 79

[49]*Id.* at 45

[50]*Id.* at 46

from Timpanogos Regional as part of Ms. Mecham's records from that stay,[51] which reflected that Ms. Mecham had been diagnosed with meningitis. At that point, Employee's counsel asked that those two pages be admitted purely as support for Petitioner's testimony. The Court marked the two pages as Exhibit "P-1" and asked if there was any objection, at which point the following discourse took place:

> Mr. KANELL: I don't have any objection, but it just seems odd that we only have these few days here.
>
> Ms. ATKIN: I actually have all of Ms. Mecham's medical records, but they're extensive and they're about the birth of her child, not about her meningitis, primarily. And so I simply chose some relevant records to show the diagnosis of meningitis.
>
> Mr. KANELL: Well, and I don't know that it actually shows that. That's why I'm saying this is difficult for me to –without having the full set here to say, 'Oh, yeah, she's diagnosed with meningitis.' There's no diagnosis here of meningitis. It says, 'meningitis resolved.' I don't know what that means. You don't get meningitis–have probable meningitis on the 20th and have it resolved on the 22nd, completely resolved, Your Honor. But–I don't have any objection, but I think it would be fair for the medical panel to have all the records." (Emphasis added)
>
> THE COURT: Well, what I'll do is–I'm going to order Ms. Atkin to provide you all the medical records. You can sift through them. If you feel that there are relevant records that refer to her treatment for the diagnosis of meningitis or those symptoms that led to this belief, then I will allow you to submit those.
>
> MR. KANELL: Okay. Thank you.[52]

8. Employee's counsel subsequently delivered the medical records of Ms. Mecham to Employer's counsel in their entirety. Instead of just submitting the additional pages

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[51] *Id.* at 57

[52] *Id.* at 57 - 58

desired, Employer filed an extensive objection[53] declaring:

> Now, Petitioner wants to admit over 100 pages of medical records presumably as evidence that if Ms. Mecham had meningitis then the petitioner had meningitis. Respondents object to the admission of Ms. Mecham's medical records on several grounds, including the residuum rule, violation of due process and violation of equal protection of the law.[54]

Employer also included a few additional pages which it wished to have included in the record from Ms. Mecham's records.

9. Employee had previously timely disclosed her intent to introduce those medical records of Ms. Mecham in her Pre-Hearing Disclosures of July 21, 2006 which listed, as Exhibits, "Petitioner's medical records, personnel records, Social Security Disability records, and the medical records of Gaylinn Mecham, from whom Petitioner contracted meningitis."[55]

10. Employer actually knew from the outset that Ms. Mecham's medical condition would be in issue as Ms. Bishop disclosed on her Application for Hearing that she was exposed to meningitis of a patient and contracted meningitis.[56]

11. While neither the parties nor the ALJ addressed this fact, Employee's exposure to meningitis during her care for Ms. Mecham occurred at Employer's own facility and all of the medical records relating to Ms. Mecham were thereby in Employer's possession and under their control from the date the incident occurred. Employer's knowledge of the

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[53] R. 162-173

[54] R. 162

[55] R. 37

[56] R. 1, 25

treatment and care of Ms. Mecham while in their facility would require that they would have known of her diagnosis of meningitis, so they could hardly claim to have been surprised by the content of those records.

12. The ALJ addressed Employer's belated objections to Ex. "P-1" but found that the due process and equal protection arguments factually had no merit because they had actual notice of Employee's intent to introduce those records and they were given an opportunity to supplement the record with additional portions of Ms. Mecham's records. He further found that the residuum rule was satisfied by the presence of other admissible evidence on that issue and that the hearsay objections failed because that Exhibit was specifically admissible hearsay under the governing statutes and the Utah Rules of Evidence.[57]

13. Employer similarly challenged the introduction of Ms. Mecham's medical records into evidence before the Appeals Board and the Commission similarly found Employer's arguments "unpersuasive" and indicated that *Utah Code Anno.* §34A-2-802 provided "broad authority" to admit and consider such records since they were "material and relevant" to the proceeding. The Commission similarly found the Employer's claims of "surprise" over the submission of those records were unfounded, noting that Employee had properly disclosed in her prehearing disclosures that she intended to submit those records at the hearing and that the ALJ provided employer with ten days after the hearing to examine and respond to the records. The Commission similarly found that the records did not violate the residuum rule, since the records were relevant only to the extent they supported or

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[57]R. 375 at 199-200

detracted from the persuasive force of the various medical opinions assessing Employee's condition and the opinions that she suffered from meningitis. Referring to those opinions, the Commission declared, "The Appeals Board views those opinions as providing a sufficient evidentiary basis to find that Ms. Bishop suffered from work related meningitis and complications thereof.[58]

14. At the hearing, contrary to the time deadlines of Administrative Rule 602-2-1, Employer sought to introduce additional medical records which had not been provided to Employee until 11:30 a. m. on the Friday prior to the Monday 8:30 a.m. hearing. Those records included an updated IME report by Dr. Knippa and a IME records review report from a new doctor, Dr. Moress..

15. In connection with the attempted introduction of the late-filed reports of Drs. Knippa and Moress, Employer contended that he had scheduled an updating exam for Employee in July with Dr. Knippa and an exam with Dr. Moress but that on the date of the exam Dr. Moress was involved in an accident and was unable to complete the appointment, although Employer was able to secure the belated IME records review from him. However, he asserted that they had not been able to examine Employee physically. In response, Ms. Atkin explained:

> First of all, when we received the notice of the IME appointments, there were three of them, the FCE, the–Dr. Moress, and Dr. Knippa had scheduled his second all-day appointment. I wrote a letter to Mr. Kanell stating that she'd already had an all-day appointment with Knippa, it was very difficult for her to do and if there was some reason that it needed to be completely redone, please contact me and tell me why and otherwise cancel the hearing.

[58]R. 369

> I did not receive any contact but I did make a note in that letter, your Honor, that I would not object to an update report based on the latest medical records review. And so I do not object to the admission of Dr. Knippa's report, because I said I wouldn't.
>
> Dr. Moress is another matter. We received this IME report that creates a pertinent issue in this case. We received it Friday at 11:30. That's half a working day before this hearing. And I object to it solely on the date of its admission.[59]

The Court noted that the Medical Exhibit already contained two prior IME's, those of Dr. Chung and Dr. Knippa and explained:

> Based on the fact that there have already been two IMEs done already in this case, and the lateness in Dr. Moress, I don't think there's an obligation, necessarily, for the Petitioner to submit to serial IMEs, once it's been in (inaudible), unless there's a compelling showing for an additional one. I don't–particularly a late admitted, I don't see a need for that.
>
> I will admit Dr. Knippa's report because there is no objection to it. I'm going to exclude Dr. Moress' report because it's untimely filed and apparently Ms. Bishop already underwent an IME from Dr. Chung.[60]

After the ALJ had excluded Dr. Moress' report as untimely filed, Employer added:

> But for Dr. Moresss' unfortunate accident, that would have–would have happened and would have been submitted. But he was out of commission for quite some time and got to the records review just as soon as he could, Your Honor. We apologize, but certainly circumstances outside of our control." [61]

No other explanation was provided by Employer as to why it had not originally sought an updated IME from their initial IME doctor, Jeff Chung, M.D rather than shopping for a new IME physician, nor why they waited until two months prior to hearing to even seek

[59]R. 375 at 10 - 11

[60]*Id.* at 12

[61]*Id.* at 11

another round of IME examinations and FCE's, nor why they took no further action through the Commission following Ms. Atkin's letter, nor even why they did not simply seek a different IME doctor to perform their records review when Dr. Moress was injured.

16. While Administrative Rule 2-2-1 (H) does provide for the introduction of late-filed records "at the the discretion of the administrative law judge by stipulation or for good cause shown," there was no stipulation in this case and the ALJ exercised his discretion in determining that there was no good cause shown for the requested admission.

17. On August 5, 2008, when Employer's Motion for Review had been pending for a year and a half, Employer filed a Motion to Remand, Reopen, or Consider New Evidence on Review, which sought to have the case reopened to introduce a deposition of Dr. Abolnik taken on May 27, 2008, in a malpractice action in District Court. Employer contended that the case should be reopened to consider this "new evidence" because Dr. Abolnik had there testified, several years after the fact, that he was under the impression that he had checked Employee for Rocky Mountain spotted fever and that the tests were negative but looking at the tests currently they might be positive and that Employee may have had Rocky Mountain spotted fever rather than meningitis.

18. The Appeals Board found Dr. Abolnik's testimony in that regard to be "ambiguous and equivocal" and noted that no further tests, studies or opinions were presented to support that speculation. The Appeals Board therefore concluded, "After due consideration, the Appeals Board finds the proffered evidence to be unreasonably late and

too insubstantial to warrant reopening the evidentiary proceedings on Ms. Bishop's claim."[62]

## SUMMARY OF THE ARGUMENT

**Point I. The Commission did not abuse its discretion in failing to submit the medical aspects of Employee's case to a medical panel.** Referral to a medical panel is mandated only where there is a significant medical issue which must generally be shown by conflicting medical reports. In the present case, the Commission found that there were no conflicting medical reports but, rather, merely a progressing course of treatment with all of the medical experts ultimately being in consensus that the events of August 19, 2002 and those subsequently related thereto caused Employee's current medical and psychological problems with their associated disabilities. Whether there are conflicting medical reports is a question of fact within the discretion of the Commission. The evidence reflected in the Commission's extensive review of the records is adequate to support those Findings.

**Point II. The Commission did not abuse its discretion when it failed to reopen the case based on the subsequent deposition of Dr. Abolnik.** Although the Commission has broad discretion under its continuing jurisdiction to reopen a case based upon subsequent new evidence, the Commission also has broad discretion to refuse to reopen the case when it determines such evidence to be insufficient to justify reopening the case. Dr. Abolnik's deposition was found to be "ambiguous and equivocal" and Employer "presented no additional tests, studies or opinions to further support Dr. Abolnik's speculation." The Commission's determination in that regard is discretionary and subject to being overturned

[62]R. 370

only if "arbitrary and capricious, .wholly without cause, or contrary to the one [inevitable] conclusion from the evidence."[63]

**POINT III. The Commission did not abuse its discretion with regard to its Findings of Fact**. The Commission carefully considered the underlying facts in this case as set forth in Employee's Statement of Facts. The Commission has broad discretion in connection with its Findings and they are subject to being overturned only if they are "arbitrary and capricious, .wholly without cause, or contrary to the one [inevitable] conclusion from the evidence."[64] In order to find such a violation, Employer must marshal the evidence in favor of those Findings and then demonstrate why it is not sufficient. Instead of doing so, Employer merely cited evidential items it deemed in support of its contentions. The underlying facts as reflected in Employee's Statement of Facts adequately support the Commission's Findings and, in any event, fail to demonstrate that those Findings were arbitrary or capricious.

**Point IV. The Commission did not abuse its discretion, and Employer's Due Process and Equal Protection rights were not violated, by the admission of the Mecham Evidence or the failure to admit the late-filed Moress IME**. Again, these matters are within the broad discretion of the Commission. However, the two incidents involved separate legal and factual issues. The admission of the Mecham evidence was not part of the Medical

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[63] *McKesson Corp. v. Labor Comm'n,* 41 P. 3d 468, quoting from *Large v. Industrial Comm'n,* 758 P. 2d 954, 956 (Utah App., 1988)

[64] *Id.*

Records of Employee and not subject to the requirement that it be produced to Employer 20 days prior to the hearing for incorporation into the Medical Exhibit. As one of the trial exhibits, Employee was only required to list it timely in her Pretrial Disclosures, which she did. Employer was fully aware that records regarding Ms. Mecham's hospitalization would be introduced and did not seek production of those documents prior to trial. When it was introduced, Employer stated that it had no objection to its admission.

The IME from employer's new physician, Dr. Moress, on the other hand, was required to be produced to Employee at least 10 days prior to the hearing. Instead, it was produced at 11:30 a. m. the Friday prior to the 8:30 a.m. Monday hearing, giving Employee no reasonable chance to review or respond. Employee objected to its admission into evidence. By Rule, the ALJ had discretion to allow introduction of such late-filed items by stipulation or for good cause, neither of which appeared in this case. Employer already had two prior IME's already in the record of Dr. Chung and Dr. Knippa and Employee had stipulated to allow admission of a late filed updated IME Report from Dr. Knippa. The ALJ's determination not to allow admission of the late-filed IME from Employer's new physician at that point was within its discretion and subject to being overturned only if it was "arbitrary and capricious, wholly without cause, or contrary to the one [inevitable] conclusion from the evidence."[65]

## ARGUMENT

[65] *Id.*

## POINT I
## THE COMMISSION DID NOT ABUSE ITS DISCRETION IN FAILING TO SUBMIT THE MEDICAL ASPECTS OF EMPLOYEE'S CASE TO A MEDICAL PANEL

The Utah Workers Compensation Act and the Commission Rules specifically allow the appointment of a separate medical panel to consider the medical aspects of a workers compensation case. The Commission has adopted Administrative Rule 602-2-2 to establish guidelines for when a medical panel is to be utilized. That Rule provides, in pertinent part:

> "A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports."[66]

In the present case, the ALJ carefully reviewed all of the medical records in detail[67] and concluded, based upon that review, that there were no conflicting medical reports. Rather, he found:

> The undisputed evidence in this case verified that on August 19, 2002 Gayelin Mecham while a patient at Timpanogas contracted meningitis and vomited on her attending nurse Tara Bishop who then also contracted meningitis. The unrefuted evidence in this case also confirms that while in the course of being treated for her meningitis symptoms at Timpanogas, Ms. Bishop went into respiratory arrest after receiving morphine. The medical evidence in this case established without any serious challenge that the occurrence of August 19, 2002 and consequent events thereafter caused Ms. Bishop to suffer: (1) meningitis; (2) hypoxic brain injury; (3) posttraumatic stress disorder; (4) depression disorder; (5) anxiety disorder; (6) chronic back pain; and (7) tinnitis. Early reservations by ER physicians about definitively diagnosing Ms. Bishop with meningitis were just that, early reservations subject to further observation and data. All of the medical experts agreed in consensus that the events of August 19, 2002 and those subsequently related thereto caused Ms.

[66]Administrative Rule 602-2-2 (A)

[67]SOF #2 and 4

> Bishop's current medical and psychological problems such as they are with associated disabilities.[68]

Clarifying those statements, in a footnote, he explained, "Some of the medical experts remained within their fields and limited their opinions accordingly. Other experts rendered opinions with varying degrees of conviction about certain diagnoses without challenging the existence of the condition head on."[69]

The Commission similarly reviewed the record and those detailed Findings and declared:

> Ms. Bishop was subsequently released from the hospital. The results of her tests for meningitis were somewhat ambiguous, resulting in equivocal diagnoses by some medical experts. However, other medical experts were unequivocal in their opinion that Ms. Bishop did, in fact, suffer from some variation of meningitis. After her ordeal, Ms. Bishop was left with chronic backache from the spinal taps she had received in the hospital. She also suffered a hypoxic brain injury, post-traumatic stress disorder, depression and tinnitis. In summary, the opinions of Ms. Bishop's treating physicians and Timpanogos's own medical experts establish that Ms. Bishop's initial illness and subsequent complications were caused by her work exposure and subsequent efforts to diagnose and treat her work-related illness.[70]

In accordance with Utah case law, the Administrative Law Judge, as well as the Commission, made factual findings based upon the record as a whole, that there were not conflicting medical reports requiring a medical panel. That determination is appropriately a question of fact as to which the broad discretionary powers of the Commission apply. The applicable law in connection with the effect of that broad discretion in appeals regarding

[68]R. 207

[69]*Id.* at footnote 9

[70]R. 367, 368

various determinations of the Commission are set forth in Point III. However, the Courts have also addressed that discretion in specific reference to medical panel referrals.

In *Brown & Root,*[71] the Court explained that the Commission has discretion to refer a case to a medical panel, but that discretion is limited by its own Administrative Rule which requires that a case be submitted to a medical panel when there are "conflicting medical reports." However, the Court also declared:

> "Whether there are conflicting medical reports is a question of fact. We must uphold the Commission's factual findings if such findings are supported by substantial evidence based upon the record as a whole. See Utah Code Ann. §63-46b-16(4)(g) (1993); accord *Zissi, 842 P. 2d 852.* When reviewing the Commission's application of its own rules, this court will not disturb the agency's interpretation or application of one of the agency's rules unless its determination exceeds the bounds of reasonableness and rationality. (Citing cases) Thus, we will overturn the agency's interpretation only if that interpretation is an abuse of discretion. *Willardson*, 904 P. 2d at 675."

The Court further explained that the existence of a medical controversy over the severity of the Employee's injury did not meet the requirement for conflicting medical reports concerning the causation of his need for surgery, so the Commission's determination not to submit the matter to a Medical Panel was appropriate.[72]

In *Hymas v. Labor Comm'n,*[73] the Court again upheld the denial of benefits to an Employee over the contention that there was a significant medical issue in the case mandating submission to a medical panel, although there were not conflicting medical

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[71]947 P. 2d 671, 677 (Utah, 1997)

[72]*Id.* at 678

[73]200 P. 3d 218, 2008 UT App. 471 (Utah App., 2008)

reports. The Court explained:

> [R]eferral to a medical panel is mandatory only where there is a medical controversy as evidenced through conflicting medical reports. Whether there are conflicting medical records is a question of fact. We must uphold the Commission's factual findings if such findings are supported by substantial evidence based upon the record as a whole. Brown & Root Indus. Serv. v. Industrial Comm'n, 947 P. 2d 671, 677 (Utah, 1997). Here, the Labor Commission's factual findings are clearly supported by the record: based on the information before the ALJ at the time of the hearing, there were no conflicting medical reports. Indeed the Labor Commission also indicated that it had reviewed additional documentation from the parties and concluded that there were still no conflicting medical reports. Accordingly, we conclude that the Labor Commission's decision does not exceed the bounds of reasonableness and rationality.[74] *See also Roberts v. Labor Comm'n.*[75]

Employer's assertions in its Brief regarding statements by doctors at various times throughout Employee's treatment may appear to be conflicting taken alone. But when all the records are considered, there is a reasonable basis for the finding that there were not conflicting medical reports. For instance, in Employer's argument concerning the medical opinions of Dr. Jeff Chung,[76] Dr. Chung did not merely indicate his diagnosis that Employee did not have "bacterial meningitis" as stated by Employer. Rather, he also stated:

> She most likely has fully recovered from her episode of possible viral meningitis." * * * The patient most likely does have a physiologic problem with a mild hypoxic brain injury, but it is unlikely that the patient's mild hypoxic brain injury without observable evidence of pathology on a MRI scan of the brain will cause significant longstanding cognitive deficits * * * My concern is with Ms. Bishop's current problems with anxiety/depression, chronic pain syndrome and postraumatic stress disorder which most likely have been caused by the sequence of events that began after her industrial

[74]200 P. 3d 218, 222, 2008 UT App. 471 (Utah App., 2008)

[75]2006 UT App. 403 (Utah App., 2006)

[76]Employer's Brief, p. 19

exposure of 8-19-02.

* * *

> Given the circumstances surrounding Ms. Bishop's clinical onset of symptoms starting on 8-19-02 and the complications that she has had subsequent to the medical treatment for such exposure, I believe the entirety of her current problems should be considered industrial without a preexisting nonindustrial component.[77]

The ALJ accurately summed up the effect of the overall statements of the medical providers in his Finding that:

> Early reservations by ER physicians about definitively diagnosing Ms. Bishop with meningitis were just that, early reservations subject to further observation and data. All of the medical experts agreed in consensus that the events of August 19, 2002 and those subsequently related thereto caused Ms. Bishop's current medical and psychological problems such as they are with associated disabilities.

Employer's assertion that there is a medical issue or conflicting medical records in this case does not require that the case be referred to a medical panel. Even if the Court should agree that there is some evidence which would support Employer's assertions, that would not meet the standard which must be applied on appeal. The Court must affirm those findings, including the finding that there are no conflicting medical reports sufficient to justify appointment of a medical panel, so long as they are "based on substantial evidence, even if another conclusion from the evidence is permissible.[78]"

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[77]SOF No. 2 k.

[78]*Brady v. Labor Comm'n,* 2010 UT App. 58 (Utah App., March 11, 2010)

## POINT II
## THE COMMISSION DID NOT ABUSE ITS DISCRETION WHEN IT FAILED TO REOPEN THE CASE BASED ON THE SUBSEQUENT DEPOSITION OF DR. ABOLNIK IN ANOTHER CASE

After entry of the ALJ'S Amended Findings of Fact, Conclusions of Law and Order of January 3, 2007, [79] in which Employee was determined to be entitled to disability benefits, Employer filed a timely Motion for Review by the Commission's Appeals Board."[80] Eighteen months later, before the Appeals Board Order had been issued, Employer filed its new Motion to Remand, Reopen or Consider New Evidence.[81] In that subsequent Motion, Employer sought to have the Appeals Board consider the "new evidence" from a deposition taken of Dr. Abolnik more than two months prior to the filing of that Motion, in a malpractice action pending in the District Court.[82] In its Order Affirming ALJ'S Decision,[83] the Appeals Board noted the lateness of the filing of the Motion. Nevertheless, it acknowledged that, because of its "continuing jurisdiction . . . in order to correct mistakes to protect the parties' substantive rights and avoid inadequate or excessive awards . . . the Appeals Board . . . carefully considered Timpanogos' [Employer's] argument and the evidence it proffered to support that argument."[84] It then explained:

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[79]R. 198 - 215

[80]R. 216 - 263

[81]R. 279 - 350

[82]R. 323 - 350

[83]R. 367 - 372

[84]R. 370

> In summary, Judge LaJeunesse found that Ms. Bishop suffered from work-related meningitis. Timpanogos has now submitted excerpts from a deposition that Dr. Abolnik, one of Ms. Bishop's treating physicians, gave in connection with another legal proceeding. In that deposition testimony, Dr. Abolnik speculated it was possible that Ms. Bishop actually had Rocky Mountain spotted fever, rather than meningitis. On that basis, Timpanogos argues that Ms. Bishop's workers' compensation claim should be reopened to allow further evidence on this alternative diagnosis.
>
> As already noted above, the medical evidence that was submitted at the hearing on September 5, 2006, establishes that Ms. Bishop suffered from meningitis. While Dr. Abolnik's more recent deposition testimony raises the possibility that Ms. Bishop had Rocky Mountain spotted fever, that testimony is ambiguous and equivocal. Timpanogos has presented no additional tests, studies or opinions to further support Dr. Abolnik's speculation."[85]

In light of those considerations, the Appeals Board declared that it found the proffered evidence to be "unreasonably late and too insubstantial to warrant reopening the evidentiary proceedings on Ms. Bishop's claim." In fact, all of the medical records submitted with that Motion were already before the ALJ at the hearing in the Medical Exhibit, Section "L."[86] Further the issue of Rocky Mountain Spotted Fever as a possible alternative diagnosis was already known at the time of the original Hearing before the ALJ. The primary defense presented by Respondents was the claim that Petitioner had some different, non-industrial condition rather than meningitis. The test results which Dr. Abolnik indicated could be positive for Rocky Mountain Spotted Fever, the records of Employee's treatment for Rocky Mountain Spotted Fever, and the early testing which was felt to be negative for Meningitis,

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[85] *Id.*

[86] R. 374 at 407 - 512

were all included in Dr. Abolnik's records in the Medical Exhibit.[87] Similarly, the fact that Employee had been to a barbeque was also noted in his records "where she was in a yard for several hours, but she did not notice any tick bites."[88] In Dr. Abolnik's deposition, several years after the fact, he indicated that he did recall previously knowing about the possible positive test result for Rocky Mountain spotted fever, but that was not new information. His records reflect that he chose to start her on a course of medication for that disease.[89] Dr. Abolnik also testified that he was not sure about his reading and it was possible the early test was merely a false positive.[90]

While meningitis was not initially found, it was clearly the final consensus as a diagnosis. That final diagnosis was not due to mistake or omission, but based on medical observation and evidence as outlined in detail by the ALJ in the Amended Findings of Fact.[91]

The Appeals Board's recognition of its power and discretion under the continuing jurisdiction of the Labor Commission was in line with the Utah Supreme Court's recent declaration that, while Rule 60, *U. R. C. P.* does not apply to matters before the Commission, it still has the authority under its grant of continuing jurisdiction to address claims which the state courts would address under Rule 60. However, the application of that continuing

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[87] *Id.*

[88] *Id.* at 434

[89] R. 374 at 435

[90] R. 334 - 338 and 345 - 346

[91] R. 201 - 207

jurisdiction is discretionary and, even then, is not unlimited as "there is a justified need for finality in administrative proceedings."[92] This Court has also explained:

> After the Commission has obtained initial jurisdiction, the Commission may not arbitrarily exercise continuing jurisdiction to modify an award. See Spencer v. Industrial Comm'n, 733 P. 2d 158, 161 (Utah, 1987). The basis for reopening a claim is provided by 'evidence of some significant change or new development in claimant's injury or proof of the previous award's inadequacy.' *Id.*"[93]

Similarly, the Commission may not reopen proceedings to consider legal arguments not previously made nor to collaterally attack a judgment based upon an erroneous view of the law.[94] Neither may it redetermine a case on identical facts because a party is dissatisfied with the former Order.[95]

Employer argues that the proffered evidence of his deposition, "stating that the respondent did not have meningitis but had Rocky Mountain Spotted Fever would have provided the petitioners' with a meritorious defense on medical causation.".[96] The Appeals Board did not agree and, rather, found the evidence to be "ambiguous and equivocal.[97]" It reflected no new information, significant changer, or new development. It merely reflected issues which were already reflected in the medical records from the hearing.

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[92]*Merrill v. Labor Comm'n,* 223 P. 3d 1099, 1102 (Utah, 2009)

[93]*Burgess v. Siaperas Sand & Gravel*, 965 P. 2d 583, 587 (Utah App., 1998)

[94]*Supra.* Note 92

[95]*Id.*

[96]Employer's Brief, p. 23

[97]R. 370

While the Commission certainly does have the discretion to reopen cases such as this based on new medical evidence, the Commission is also vested with the discretion not to reopen the case. In this case, while Employer may disagree with the Appeals Board's factual determination that Dr. Abolnik's testimony was "ambiguous and equivocal" and insufficient to justify reopening the case, that determination is within the discretion of the Commission. As reflected in Point III regarding other issues on this appeal, the Appeals Board properly exercised its broad discretionary powers. Employer's assertion that the deposition provided new information does not require that the Commission reopen the case. Even if the Court should agree that the deposition might contain some new information, that would not meet the standard which must be applied on appeal. The Court must affirm the Commission's refusal to reopen the case based upon that deposition if that decision was "based on substantial evidence, even if another conclusion from the evidence is permissible.[98]"

## POINT III
## THE COMMISSION DID NOT ABUSE ITS DISCRETION WITH REGARD TO ITS FINDINGS OF FACT

Employer contends the Commission's Findings that Employee contracted meningitis at work at Timpanogos Hospital are arbitrary and capricious and not based on substantial evidence, since, "The weight of the evidence in this matter establishes that Ms. Bishop did not, in fact, contract viral or bacterial meningitis from work."[99]

There is evidence of record, outlined in detail by the ALJ in his Findings, upon which

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[98]*Supra.,* Note 78

[99]Employer's Brief, p. 24

the Commission's Findings may properly be based,[100] despite Employer's assertions. The ALJ and the Commission found, based upon a detailed examination of the record as a whole, in accord with specific determinations of various medical providers, that Employee's injuries arose from the incident on August 19, 2002. The early tests upon which Employer relies were not items to be considered alone. Rather, the medical providers utilized them in conjunction with other observations and determinations as treatment progressed. Although there may have been some tests and laboratory evidence which were not supportive of a diagnosis of meningitis early on, as the treatment progressed the providers determined that the initial exposure to meningitis on August 19, 2002, was the cause of her ongoing problems, despite the earlier tests. As the ALJ noted, "Some of the medical experts remained within their fields and limited their opinions accordingly. Other experts rendered opinions with varying degrees of conviction about certain diagnoses without challenging the existence of the condition head on."[101]

The Findings by the Commission of which Employer complains, given all of the background and circumstances involved, and notwithstanding Employer's desire to attempt to focus solely upon earlier tests and initial diagnoses, were supported by an evidential base.

The Utah Labor Commission has broad discretion when considering factual issues. It has been statutorily given the full power, jurisdiction and authority to determine the facts and apply the law in worker's compensation matters. As this Court has previously declared:

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[100]SOF Nos. 1 - 5

[101]R. 207, footnote 9

> "In this case, the Legislature has granted the Commission discretion to determine the facts and apply the law to the facts in all cases coming before it. *See* Utah Code Ann. §34A-1-301 (1997). . . . As such, we must uphold the Commission's determination . . . unless the determination exceeds the bounds of reasonableness and rationality so as to constitute an abuse of discretion under 63-46b-16(h)(i) of the UAPA."[102]

The Court will not overturn the factual findings in a workers' compensation case, "unless they are arbitrary and capricious, or wholly without cause, or contrary to the one [inevitable] conclusion from the evidence."[103] Although Employer seeks to rely upon portions of the medical records which it feels are in its favor, and even if the Court should agree that some of those records would support Employer's argument, that is not the test to be applied upon Appeal.

This is perhaps best illustrated in *Brady v. Labor Comm'n,* [104]a recent case handed down by this Court. There, the ALJ had denied benefits and the Commission had denied Employee's Motion for Review. On appeal, the Court noted that the Employee did not directly challenge the ALJ's findings but, rather "reargues the weight of evidence, listing facts that do and do not support the ALJ's decision while emphasizing medical evidence that supports his theory." The Court indicated that it agreed with Brady that "some of the evidence supports his theory." However, the Court explained that was not the standard to be applied on Appeal:

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[102]A. E. *Clevite v. Labor Commission*, 996 P. 2d 1072, 1074 (Utah App., 2000), cert. den. 4 P. 3d 1289 (Utah, 2000)

[103]*Supra.*, Note 63

[104]*Supra.*, Note 78

> We agree with Brady that some record evidence supports his theory. But that is not the standard on appeal. We will affirm so long as the Commission's findings are 'based on substantial evidence, even if another conclusion from the evidence is permissible.'" Whitear v. Labor Comm'n, 973 P. 2d 982, 984 (Utah Ct. App., 1998) (quoting Hurley v. Board of Review of Industrial Comm'n, 767 P. 23d 524, 526-27 (Utah 1988)). Here, although Brady may have competing medical theories, the ALJ's and the Commission's conclusions were certainly supported by substantial evidence that the industrial accident was not the 'direct cause' of Brady's permanent total disability. Accordingly, we affirm the Commission's conclusion."[105]

This is also the reason why an Appellant must marshal the evidence when it seeks to challenge findings of the Commission as being unsupported by substantial evidence. The Courts have explained that this marshaling process is fundamentally different from that of presenting their claims at a hearing. It does not mean that Appellants may select only portions of the material facts to set forth but, rather, that the Appellants must basically act as a "devil's advocate," presenting, "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists."[106] As Utah's Supreme Court has explained:

> Appellants cannot merely present carefully selected facts and excerpts from the record in support of their position. (citing cases) Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact. (citing cases) Furthermore, appellants cannot shift the burden of marshaling by falsely claiming that there is no evidence in support of the trial court's findings.[107]

The Court went on to emphasize that, "If the marshaling requirement is not met, the appellate

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[105] *Id.*

[106] *Chen v. Stewart*, 2004 UT 82, 100 P. 3d 117 (Utah, 2004)

[107] *Id.* at 1195

court has grounds to affirm the court's findings on that basis alone" and "we assume that the evidence supports the trial court's findings."[108]

Rather than marshaling all the evidence in support of the Commission's determinations on the issues presented in Employer's Brief, Employer has chosen to reference only the underlying facts or evidence it deems in its favor. For instance, as more fully reflected in Employee's Statement of Facts,[109] much more was involved in the ALJ's and Appeals Board's Findings beyond merely the medical opinions of Dr. Berry or the suppositions of Dr. Chung and Dr. Abolnik.[110] Similarly, much more was involved than some prejudice against Employer in the determination to admit Exhibit P-1 (the two pages of records of Ms. Mecham)[111] and in the determination to reject the late-filed IME report of Dr. Moress.[112]

The Court will not overturn the Commission's factual findings , "unless they are arbitrary and capricious, or wholly without cause, or contrary to the one [inevitable] conclusion from the evidence."[113] Particularly where Employer has failed to properly marshal the evidence in support of those findings as part of his challenge, there is no basis

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[108]*Id.* at 1196. See also *Merriam v. Industrial Comm'n,* 812 P. 2d 447, 450 (Utah App., 1991); *Featherstone v. Industrial Comm'n*, 877 P. 2d 1251, 1254 (Utah App., 1994)

[109]SOF Nos. 1 - 5

[110]*Id.*

[111]SOF Nos. 7 - 13

[112]SOF Nos.14 - 16

[113]*Supra.,* Note 63

upon which the Court should overturn those findings.

## POINT IV
## THE COMMISSION DID NOT ABUSE ITS DISCRETION, AND EMPLOYER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS WERE NOT VIOLATED, BY THE ADMISSION OF THE MECHAM EVIDENCE OR THE FAILURE TO ADMIT THE LATE-FILED MORESS IME

### 1. The Mecham Records set forth in Exhibit "P-1" were properly admitted.

Employer contends the ALJ abused its discretion and violated Employer's due process and equal protection rights by allowing Employee to submit two pages of "late-filed" medical records relating to Ms. Mecham's treatment and yet failing to allow the admission of the additional late-filed IME report of Dr. Moress. The problem with those assertions is that the introduction of these two items of evidence involved completely different factual and legal issues.

Employee did not attempt to introduce any "late filed" medical records. Rather she sought to introduce two pages of progress notes from Timpanogos Regional relating to the treatment of Ms. Mecham, the woman from whom Employee contracted meningitis. [Exhibit "P-1"], after laying a proper foundation.[114] Employee had timely disclosed her intent to introduce "the medical records of Gaylinn Mecham, from whom Petitioner contracted meningitis" in her Pre-Hearing Disclosures of July 21, 2006[115]. The Labor Commission's Administrative Rule 602-2-1(7)(I)(3) only requires the parties to identify the documents they will be seeking to admit at the hearing and does not require actual production of those

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[114]SOF No. 7

[115]SOF No. 9

documents.[116] The Labor Commission's Administrative Rule 602-2-1 (H) which requires Employee to provide the documents in its possession to Employer at least 20 working days prior to the hearing relates only to the medical records of the Employee which are required to compile her medical records into the Medical Exhibit.[117]

In any event, Employer knew from the outset that Ms. Mecham's medical condition would be an issue as Employee disclosed on her Application for Hearing[118] Further, while neither the parties nor the ALJ addressed this fact, Employee's exposure to meningitis during her care for Ms. Mecham occurred at Employer's own facility so all of the medical records were held by Employer from the date of the incident. Employer's knowledge of the treatment and care of Ms. Mecham in their facility would have required that they know of her diagnosis of meningitis.

Employer's arguments concerning the introduction of Exhibit "P-1" are further belied by the fact that, at the time that Exhibit was offered, Employer specifically stated that it had no objection. There was then a short discussion regarding additional records which Employee had from Ms. Mecham's hospitalization and Employee's indication that the two pages of progress notes had been chosen merely because they referenced Ms. Mecham's diagnosis of meningitis. Counsel for Employer then again stated that it had no objection to the introduction of Exhibit "P-1," but felt that the panel should have all the records. The

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[116]See Determinative Statutes and Rules

[117]See Determinative Statutes and Rules

[118]SOF No. 10

Court thereupon admitted Exhibit "P-1" and indicated that Employer could subsequently review those remaining hospital records and submit the portions of those records which they felt would be appropriate.[119] In accordance with the provisions of Administrative Rule 602-2-1 (I) (8), the evidentiary record was closed at the conclusion of the hearing, and no additional evidence would be accepted without leave of the administrative law judge,[120] other than the possible submission of additional portions of the Mecham Records from Employer.

Despite the Court's instructions to Employer, although Exhibit "P-1" had already been admitted with no objection, and although the evidentiary record had been closed, Employer subsequently filed an extensive objection inaccurately declaring :

> Now, Petitioner wants to admit over 100 pages of medical records presumably as evidence that if Ms. Mecham had meningitis then the petitioner had meningitis. Respondents object to the admission of Ms. Mecham's medical records on several grounds, including the residuum rule, violation of due process and violation of equal protection of the law.[121]

In fact, Employee never sought admission of anything other than the two pages of progress notes which had previously been admitted as Exhibit "P-1." Although the objection was untimely since the Exhibit had already been admitted and the evidentiary record closed, the ALJ nevertheless addressed those objections in detail, explaining that such statements were not excluded as hearsay under *Ut. R. Evid.* 803.4 since it consisted of "Statements for purposes of medical diagnosis and treatment" and, further, that *Utah Code Anno.* §34A-2-

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[119]SOF No. 8

[120]See Determinative Statutes and Rules

[121]SOF Nos. 7 - 8

802 (2) specifically provides that the Commission may receive as evidence and use as proof of any fact in dispute all evidence deemed material and relevant (including but not limited to hospital records).[122]

The Appeals Board further found that exhibit was admissible, since it was "material and relevant" to the proceedings under *Utah Code Anno.* §34A-2-802. It also concluded that Employer was not surprised by the records nor denied a fair opportunity to evaluate and respond to them. As to the claim that the Exhibit violated the residuum rule, the Board explained that those records were relevant "only to the extent they support or detract from the persuasive force of the various medical opinions assessing Ms. Bishop's condition." The Board went on to explain that, therefore, there is significant other evidence which reflects that Ms. Bishop suffered from work-related meningitis and complications thereof, including "the opinion of Dr. Chung, Timpanogos's own medical consultant, who states that Ms. Bishop's medical problems 'should be considered industrial.'"[123]

Employer's arguments asserting the wrongful admission of Exhibit "P-1" are further eroded by the fact that, even if Employer had not made any specific statement that it had no objection to the admission of Exhibit "P-1," its failure to make a timely objection at the hearing to the perceived improper admission of evidence would have waived any such error and the issue concerning that alleged improper admission would not be properly preserved for Appeal. *Ut. R. Evid.* 103 (a) provides:

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[122]SOF No. 12

[123]SOF No. 13

> (a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (a)(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of the objection, if the specific ground was not apparent from the context . . .

Those provisions have been regularly applied by Utah's Courts to preclude claims on appeal concerning the improper admission of evidence when no timely objection has been filed. See, for example, *Commercial Financing Corp v. Davis,*[124] *State v. Shickles,*[125] and *State v. Dibello.*[126] If a failure to enter a timely objection constitutes waiver of the alleged error, stating that there is no objection to the alleged error constitutes clear waiver of the alleged error. Under such circumstances, that issue is not properly preserved for appeal.

Of even greater import, perhaps, is Employer's failure to recognize that the determination complained of is one within the discretion of the Commission.[127] The issue on appeal is not whether the Employer or this Court may agree with that determination but, rather, whether that determination was "arbitrary and capricious, or wholly without cause, or contrary to the one [inevitable] conclusion from the evidence,"[128] or whether it was

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[124]657 P. 2d 234, 240 (Utah, 1982)

[125]760 P. 2d 291, 301 (Utah, 1988)

[126]780 P. 2d 1221, 1226 (Utah, 1989)

[127]See Point III

[128]*Supra.*, Note 63

supported by evidence, "even if another conclusion from the evidence is permissible."[129] Employer's arguments and contentions fail to meet that standard.

**2. The late-filed IME Report of Employer's new physician, Dr. Moress, was properly denied admission into evidence.**

The Labor Commission's Administrative Rule 602-2-1 provides that "Late-filed medical records may or may not be admitted at the discretion of the administrative law judge by stipulation or for good cause shown." As with the other determinations challenged by Employer in this case, this is a matter of discretion with the Commission and the test on appeal is not whether there may be some evidence contrary to that determination, or even whether the court might agree with some of the contentions of Employer regarding that determination. The test is whether that determination was "arbitrary and capricious, or wholly without cause, or contrary to the one [inevitable] conclusion from the evidence."[130]

In *Strieker v. Labor Comm'n,*[131] this Court upheld an ALJ's extension of time for filing of records. While in the present case, Employer seeks to have the court overturn the ALJ's denial of such an extension for Dr. Moress' records, the same rules and guidelines are involved. In that case, the Court explained:

> But 'when reviewing an agency's decision [this Court] does not conduct a de novo credibility determination or reweigh the evidence.' Questar Pipeline Co. V. Utah State Tax Comm'n, 850 P. 2d 1175, 1178 (Utah, 1993). It is the responsibility of the party challenging the agency's findings to demonstrate the findings 'are not supported by substantial evidence.' Hales Sand & Gravel,

[129] *Supra.*, Note 78

[130] *Supra.*, Note 63

[131] 2006 UT App. 143 (Utah App., 2006)

> Inc. V. Audit Div. Of State Tax Comm'n, 842 P. 2d 887, 888 (Utah, 1992). Thus, in the present case, Strieker 'bore the burden of marshaling all the evidence supporting the findings and then . . . showing that the findings [were] not supported by substantial evidence.' Kennecott Corp. V. State Tax Comm'n, 858P. 2d 1381, 1385 (Utah 1993). Strieker failed to meet her marshaling burden and further neglected to show that the agency's findings were not supported by substantial evidence. We therefore accept the ALJ's findings as conclusive, see Johnson v. Board of Review, 842 P. 2d 910, 912 (Utah Ct. App. 1992).. . .[132]

At the hearing on Monday, September 5, 2006, Employer sought to introduce the updated IME by Dr. Knippa dated August 31, 2006 and an IME Report from employer's new physician, Dr. Moress. Employee stipulated to the admission of Dr. Knippa's late-filed updated records review because she had previously agreed to it. However, she objected to the admission of the new Moress IME Report as being late-filed, noting that she had been provided a copy of that report at 11:30 a.m. of the Friday prior to that 8:30 a.m. Monday hearing and had no opportunity to review or respond to it. She also explained that she had objected in writing to Employer regarding the en masse attempt in July to set up a second FCE another all day appointment with Dr. Knippa and an appointment with Dr. Moress for a new IME exam and had indicated that they saw no reason why Employee should have to go through those. She indicated in her letter that she was willing to agree to an updated records review IME by Dr. Knippa and invited their response if they disagreed.[133]

Employer's claims regarding the need to allow that late-filed IME Report from a new doctor (Dr. Moress) did not satisfy the ALJ as constituting good cause, when they already

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[132]*Id.* at 144

[133]SOF No. 15

had IME's from Dr. Chung and Dr. Knippa (a late-filed update of which was being allowed into evidence due to the stipulation of Employee) in the Medical Records Exhibit and the new IME Report was so significantly late-filed (one-half working day before the hearing).[134]

The ALJ noted that the Medical Exhibit already contained two prior IME's, those of Dr. Chung and Dr. Knippa and explained:

> Based on the fact that there have already been two IMEs done already in this case, and the lateness in Dr. Moress, I don't think there's an obligation, necessarily, for the Petitioner to submit to serial IMEs, once it's been in (inaudible), unless there's a compelling showing for an additional one. I don't–particularly a late admitted, I don't see a need for that.
> I will admit Dr. Knippa's report because there is no objection to it. I'm going to exclude Dr. Moress' report because it's untimely filed and apparently Ms. Bishop already underwent an IME from Dr. Chung.[135]

In the present case, there was neither a stipulation (there was actually an objection) nor, in the ALJ's opinion, good cause shown for admission of the late filed IME Report by a new doctor (Dr. Moress). The ALJ explained in his Findings of Fact, Conclusions of Law and Order:

> "I excluded an IME report by Dr. Gerald Moress tardily proffered from respondents and objected to by petitioner. Respondents already had multiple IME reports from both Dr. John Knippa PhD and Dr. Jeff Chung, M.D. admitted into the evidentiary record as part of Exhibit 'J-1' Therefore, I considered as unwarranted the attempt by respondents to late file another IME report that petitioner had no opportunity to respond to.

Employer has cited several factors in support of why it contends the ALJ should have allowed the late-filed Moress IME Report but it fail to marshal the evidence supporting the

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[134]See SOF No. 15

[135]R. 375 at 12

ALJ's determination. As the record reflects, there was a reasonable basis for that discretionary determination "even if another conclusion from the evidence is permissible,"[136] and no showing that the determination was "arbitrary and capricious, or wholly without cause, or contrary to the one [inevitable] conclusion from the evidence."[137]

## CONCLUSION

When all of the relevant facts of this case are considered, other than the fact that Employer disagrees with the findings made, it becomes clear that Employer has failed to marshal the evidence supporting the discretionary actions of which it complains. The record adequately supports those determinations "even if another conclusion from the evidence is permissible."[138] Employer has failed to establish that those determinations are "arbitrary and capricious," "wholly without cause," "contrary to the one [inevitable] conclusion from the evidence" or that they were outside the bounds of "reasonableness and rationality."[139] The Commission's Order Affirming ALJ's Decision dated January 22, 2010 should be affirmed.

Respectfully Submitted this 9th day of August, 2010

By: 

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[136] *Supra.*, Note 78

[137] *Supra.*, Note 63

[138] *Supra.*, Note 78

[139] *Supra.*, Note 63

MAILING CERTIFICATE

I HEREBY CERTIFY that, on the 9th day of August, 2010, two true and correct copies of the BRIEF OF RESPONDENT, TARA BISHOP (EMPLOYEE), together with the appropriate Briefs on Disc, were deposited with the United States mails, first class postage prepaid, and duly addressed for delivery to each of the following:

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